McElroy, Sullivan & Miller, L.L.P.
Attorneys at Law

MAILING ADDRESS
P.O. BOX 12127
AUSTIN, TX 78711

1201 SPYGLASS DRIVE
SUITE 200
AUSTIN, TX 78746

TELEPHONE
(512) 327-8111

FAX
(512) 327-6566

April 19, 2010

Via Hand Delivery

Ms. LaDonna Castanuela
Chief Clerk, MC-105
Texas Commission on Environmental Quality
P.O. Box 13087
Austin, Texas 78711-3087

Re: SOAH DOCKET NO. 582-09-2005; TCEQ DOCKET NO. 2009-0033-AIR
Application of Las Brisas Energy Center, LLC for State Air Quality
Permit Nos. 85013, PSD-TX-1138, HAP48, and PAL41

Dear Ms. Castanuela:

Enclosed for filing in the above referenced matter are an original and eight copies of Environmental Defense Fund's Exceptions to the Proposal for Decision. Please return one file-stamped copy to our courier.

Thank you for your assistance in this matter.

Sincerely,

Matthew Baab

MWB/pdb
5043-09
Enclosure

cc: Honorable Craig R. Bennett, Administrative Law Judge (via hand delivery)
Honorable Tommy L. Broyles, Administrative Law Judge (via hand delivery)
SOAH Docket Clerk (via hand delivery)
All parties (via facsimile or first class mail)

SOAH DOCKET NO. 582-09-2005
TCEQ DOCKET NO. 2009-0033-AIR

APPLICATION OF	§	**BEFORE THE STATE OFFICE**
LAS BRISAS ENERGY	§	
CENTER, LLC FOR STATE	§	**OF**
AIR QUALITY PERMIT NOS.	§	
85013, PSD-TX-1138, HAP 48,	§	**ADMINISTRATIVE HEARINGS**
AND PAL 41		

ENVIRONMENTAL DEFENSE FUND'S EXCEPTIONS TO THE PROPOSAL FOR DECISION

TO THE HONORABLE COMMISSIONERS:

COMES NOW Protestant Environmental Defense Fund, Inc. ("EDF") and files these Exceptions to the Proposal for Decision ("PFD") submitted by the Administrative Law Judges ("ALJs") in the referenced dockets.

I. INTRODUCTION

EDF agrees with the ALJs that Applicant Las Brisas Energy Center, LLC ("Las Brisas" or "Applicant") failed to meet its burden of proof on numerous issues, including without limitation MACT review for the Las Brisas Energy Center ("LBEC") circulating fluidized bed ("CFB") boilers, emissions from material handling, and air dispersion modeling. As recognized in the PFD, the Application and the evidence submitted by the Applicant in this matter are characterized by pervasive errors, omissions, and outright refusals to make showings required by the Commission's rules and the Texas SIP.

Given the ALJs' recommendations and in the interest of brevity, EDF focuses only on matters specifically requested to be briefed by the ALJs along with a few selected

exceptions to the PFD.[1] EDF incorporates by reference herein the Exceptions filed by other Protestants in addition to the arguments set forth in EDF's Closing Brief and Reply Brief previously filed in these dockets.

II. THE PROPER DISPOSITION OF THIS CASE

A. Texas Health and Safety Code § 382.0518 Does Not Allow Applicant to Remedy Its Total Failure to Meet Its Burden of Proof at this Late Hour.

The ALJs have specifically requested that the parties brief "the Commission's possible different methods of handling this case." In particular, the ALJs have raised a question whether Texas Health & Safety Code §§ 382.0518(d) and (e) apply to this case and, if so, what those sections require. The cited sections of § 382.0518 provide as follows:

> (d) If the commission finds that the emissions from the proposed facility will contravene the standards under Subsection (b)[2] or will contravene the intent of this chapter, the commission may not grant the permit, permit amendment, or special permit and shall set out in a report to the applicant its specific objections to the submitted plans of the proposed facility.
>
> (e) If the person applying for a permit, permit amendment, or special permit makes the alterations in the person's plans and specifications to meet the commission's specific objections, the commission shall grant the permit, permit amendment, or special permit. If the person fails or refuses to alter the plans and specifications, the commission may not grant the permit, permit amendment, or special permit. The commission may refuse to accept a person's new application until the commission's objections to the plans previously submitted by that person are satisfied.

[1] The limited scope of these objections should not be construed as a limit on or a waiver of issues that may be raised in a future motion for rehearing.

[2] This subsection provides: (b) The commission shall grant within a reasonable time a permit or permit amendment to construct or modify a facility if, from the information available to the commission, including information presented at any hearing held under Section 382.056(k), the commission finds: (1) the proposed facility for which a permit, permit amendment, or a special permit is sought will use at least the best available control technology, considering the technical practicability and economic reasonableness of reducing or eliminating the emissions resulting from the facility; and (2) no indication that the emissions from the facility will contravene the intent of this chapter, including protection of the public's health and physical property.

Tex. Health & Safety Code §382.0518(d)-(e) (emphasis added).

The ALJs note that they have been unable to find any authority addressing §382.0518(d) and (e). EDF's research has similarly revealed little authority concerning these provisions. Nevertheless, the plain terms of these provisions are instructive. First, as will be discussed in greater length in Section II.B below, §382.0518(e) makes clear that the process provided by §382.0518 may require the filing of a new application as it expressly contemplates that the Commission "may refuse to accept a person's new application" unless objections to previously submitted plans are satisfied.

Second, the language of these sections calls into question whether they provide any remedy to the Applicant here. By its own terms, §382.0518(d) applies in circumstances where "the commission finds that the emissions from the proposed facility will contravene the standards under Subsection (b) or will contravene the intent of this chapter." But several of the grounds for denial cited in the PFD go far beyond mere findings that various aspects of the proposed LBEC facility will violate applicable standards. Instead, the PFD discloses repeated and wholesale failures by the Applicant to make required showings as to whether or not the proposed facility will comply with applicable standards. Specifically, the ALJs found that the Applicant <u>failed to meet its burden of proof on numerous issues</u>, including:

1. Failure to Perform MACT Analysis for the CFB Boilers. See PFD p. 23 (stating that, "[b]ecause no MACT analysis was performed for the boilers, *LBEC's application is deficient and must either be denied or remanded to the ED for further technical review* to cure this deficiency . . .)(emphasis added).

2. Failure to Account for Secondary Emissions from Material Handling. See PFD at p. 46-47 (noting "LBEC has not met its burden of proving that it properly modeled all emissions, including material handling emissions . . . [a]ccordingly, the permit should either be denied or remanded to the [ED] for further technical review.")

3. Pervasive Modeling Errors. See PFD at pp. 54-56, 58, 65-66. (noting ED's request for remand and finding that due to multiple errors in air dispersion modeling, modeling must be corrected).

Each of these fundamental deficiencies relates to matters that the Applicant must demonstrate in its Application pursuant to TCEQ rules.[3] The language of §382.0518(d) and (e) does not expressly address such a fundamental failure, and therefore raises a significant question whether §382.0518(d) and (e) even apply in this instance.

But even if §382.0518(d) and (e) do apply in this case, their terms do not allow the Applicant to remedy its failure to meet its burden of proof. Notably, §382.0518(d) provides for a report from the Commission which sets forth the TCEQ's "specific objections to the *submitted plans of the proposed facility*." (emphasis added). Subsection (e) then allows the Applicant may "make[ ] alterations in the . . . plans and specifications to meet the commission's specific objections." By their plain terms, these provisions only address shortcomings in the applicant's "plans" and "specifications."

While in some cases it may be possible to address the Commission's objections by simply making such changes, here the Applicant cannot correct the fundamental errors in this case – the failures to meet its required burden of proof in a contested case proceeding – by merely changing "plans" or "specifications." As such, §382.0518(d) and (e) do not provide for any remedy in this case, at least absent an amended application and

[3] See 30 TAC § 116.111(a)(2)(I), (K) (providing that "in order to be granted a permit, *the application must include* . . . information which demonstrates that emissions from the facility comply with" specified legal requirements including the provisions for Prevention of Significant Deterioration ("PSD") review and requirements governing hazardous air pollutants)(emphasis added).

a new hearing. The only proper disposition of the Application in its current state is denial. [4]

B. To the Extent the Applicant Has Any Remedy, Applicable Statutes and Rules Require the Application to Be Re-filed and Re-Noticed.

Reading Texas Health and Safety Code §382.0518 in light of other provisions in Chapter 382 further confirms that the Applicant must file a new application if it wishes to correct its many failures to make showings that are required in the application pursuant to 30 TAC §116.111. As noted above, Texas Health & Safety Code §382.0518(e) contemplates that any review of an applicant's revised plans and specifications must be part of a new application, providing that "[t]he commission may refuse to accept a person's *new application* until the commission's objections to the plans previously submitted by that person are satisfied." (emphasis added) (highlighting the distinction between "plans and specifications" and the more encompassing "application"). This conclusion is further compelled by Texas Health and Safety Code §382.0291, which provides as follows in relevant part:

> An applicant for a license, permit, registration, or similar form of permission required by law to be obtained from the commission *may not amend the application after the 31st day before the date on which a public hearing on the application is scheduled to begin. If an amendment of an application would be necessary within that period, the applicant shall resubmit the application to the commission* and must again comply with notice requirements and any other requirements of law or commission rule as though the application were originally submitted to the commission on that date.

Tex. Health & Safety Code § 382.0291(d)(emphasis added).

[4] Denial is additionally an equitable result given that Protestants notified Applicant well prior to hearing via discovery responses and at least two Motions for Summary Disposition, that the Application was defective on both the MACT and material handling issues. In spite of this notice, the Applicant never amended its Application. As a result, all of the parties were subjected to the time and expense of a two-week evidentiary hearing on a fundamentally defective application. The Applicant knowingly assumed the risk of these critical deficiencies.

Statutory provisions are to be construed so as to harmonize them with other relevant laws. *La Sara Grain Co. v. First Nat'l Bank*, 673 S.W.2d 558, 565 (Tex.1984). Read together, Texas Health & Safety Code §382.0518 and §382.0291 require the Applicant to re-file and re-notice its application if it wishes to attempt to correct the fundamental defects cited by the ALJs. This case has proceeded long past "the 31st day before the date on which a public hearing on the application is scheduled to begin" referenced in §382.0291(d). Yet in its present state, the Application fails to make numerous showings required under TCEQ's rules, including the showings required by 30 TAC § 116.111(a)(2)(I) and (K). Accordingly, §382.0219 requires that the Applicant amend its Application and include additional information demonstrating emissions from the proposed facility meet PSD review requirements (in light of the Application's omission of secondary emissions from material handling and pervasive air dispersion modeling errors) and requirements for hazardous air pollutants (in light of the Applicant's failure to account for the hazardous air pollutants emitted from the CFB boilers). See 30 TAC §§ 116.111(a)(2)(I), (K).[5] And, in accordance with the plain terms of Texas Health and Safety Code §382.0291(d), the Applicant "must again comply with notice requirements and any other requirements of law or commission rule as though the application were originally submitted to the commission on that date."

[5] Similarly, TCEQ's rules governing hazardous air pollutants independently require a new application. Pursuant to these rules, applicants for permits to emit hazardous air pollutants *must submit a permit application and comply with public notice requirements*. See 30 TAC §§ 116.404, .406. In this case, the Applicant contended the LBEC CFB boilers were completely exempted from MACT requirements – a position that the ALJs have rejected as erroneous. Insofar as the Applicant must now obtain authorization for the hazardous air pollutants emitted from the LBEC CFB boilers, TCEQ's hazardous air permitting rules also require that the Applicant file a new or amended application for a permit fully addressing the hazardous air pollutants emitted by the CFB boilers, and comply with the notice provisions set forth in 30 TAC Chapter 39. See 30 TAC § 116.404, .406.

In summary, Chapter 382 of the Texas Health & Safety Code and TCEQ's rules make clear that the fundamental defects in the Application cannot be cured unless Las Brisas amends its application and carries its burden of proof of showing the proposed facility complies with applicable legal requirements. Texas Health & Safety Code §§ 382.0219(d); 382.0518(e); 30 TAC § 116.111(a)(2)(I), (K). In doing so, Applicant must correct the numerous errors and omission identified by the ALJs, comply with the notice provisions and other requirements set forth in §382.0291(d), and carry its burden of proof in a contested case hearing if one is requested. Absent such a re-submittal, the only appropriate disposition is denial.

III. EXCEPTIONS TO THE PROPOSED ASSESSMENT OF TRANSCRIPT COSTS AGAINST PROTESTANTS.

The Applicant requested that the Protestants pay one-half of $35,830.54 in transcript costs incurred by the Applicant as reflected in Attachment I to the Applicant's Closing Arguments. Attachment I discloses that this sum covered not just the transcription costs, but also additional costs for next-day transcripts. In the PFD, the ALJs agree that it is improper to require Protestants to pay the Applicant's next-day transcript costs, but nevertheless recommend that three Protestants – EDF, Sierra Club and CACC – each reimburse Applicant for transcript costs in the amount of $2,833.00. PFD at 119-20. This figure was computed by assuming the Applicant's non-expedited transcript costs are $17,000.00, dividing that figure in half, and allocating the resulting $8,500.00 figure between the three Protestants. PFD at 120.

EDF submits that requiring Protestants to pay transcript costs is not supported by the record as there is *no evidence whatsoever* of the Applicant's actual, non-expedited transcript costs. As the party seeking recovery of transcript costs, the Applicant had the

burden of submitting evidence of its actual reimbursable costs. Applicant failed to do so, and therefore there is no evidence of Applicant's actual costs to support the allocation.

More fundamentally, Applicant failed to make any showing why it is proper or equitable to tax costs to Protestants. Notably, two of the multiple grounds on which the ALJs recommend denial in the PFD – offsite material handling and MACT review for the CFB boilers – were the subject of Motions for Summary Disposition filed prior to hearing by EDF and Sierra Club, respectively. EDF and Sierra Club each raised these critical defects in the Application well in advance of hearing. EDF further raised these issues months before hearing in its Rule 194 disclosures, and again on the first day of hearing. Nevertheless, *the Applicant willingly proceeded to an evidentiary hearing under a fundamentally defective Application.* As a result, the Protestants including EDF and Sierra Club were forced to incur very significant expenses in attorney fees, expert fees, hotel and travel costs in order to attend a two week evidentiary hearing in Corpus Christi. The transcript costs the Applicant now seeks were likewise necessitated by its own decision to proceed to hearing – costs which could have and should have been avoided. Further, in the event of a remand of this proceeding, it is very likely that EDF will be required to re-litigate this matter.

Had Protestants not raised these fatal shortcomings multiple times before hearing, EDF might agree that some sharing of transcript costs would be appropriate in this case. But given that Protestants repeatedly raised multiple and fundamental defects in the Application prior to hearing, which the ALJs have now found in fact necessitate denial or remand, EDF submits that Protestants should not be required to shoulder transcript costs. These transcript costs resulted solely from the Applicant's conscious decision to proceed

to hearing on a defective application.[6] EDF respectfully requests that the PFD be modified insofar as it requires Protestants to pay transcript costs.

IV. CONCLUSION

As confirmed by the PFD, Las Brisas's Application is fatally defective in numerous respects and cannot be granted in its present state. In accordance with the PFD, and for each of the reasons described above and in EDF's Closing Brief and Reply Brief previously filed in this matter, EDF respectfully requests that the Application be denied. In the alternative, if the Commission determines remand is appropriate for any reason, then EDF requests that, pursuant to multiple Texas Health and Safety Code provisions including §382.0291 and §382.0518(e), the Applicant should be required to re-file and re-notice its Application. In addition, EDF respectfully requests that the PFD be modified insofar as it requires EDF and any other Protestants to pay transcript's costs, and that the Commission grant such other and further relief to which EDF and the other Protestants show themselves justly entitled.

[6] EDF additionally notes that in the recently issued Proposal for Decision in the IPA Coleto Creek, LLC permit proceeding, the judges recommended allocating all the transcript costs to the Applicant, and cited as one factor in doing so the fact that the Applicant requested direct referral of the matter to SOAH. See Proposal for Decision, Docket No. 582-09-2045, 2009-0032-AIR, *Application of IPA Coleto Creek, LLC for State Air Quality Permit 83778 and Prevention of Significant Deterioration Air Quality Permit PSD-TX-1118 and for Hazardous Air Pollutant Major Source [FCAA § 112(g)] Permit HAP-18*, at p. 119-20 (February 8, 2010). In this case, the Applicant similarly requested a direct referral.

Respectfully submitted,

Thomas M. Weber
State Bar No. 00794828
Matthew W. Baab
State Bar No. 24027049
Clark Jobe
State Bar No. 24046159
McElroy, Sullivan & Miller, L.L.P.
P.O. Box 12127
Austin, Texas 78711
Tel. (512) 327-8111
Fax (512) 327-6566

Attorneys for Environmental Defense Fund, Inc.

CERTIFICATE OF SERVICE

I certify that on April 19, 2010 a true and correct copy of the following has been sent to the representatives of parties on the official service list by hand delivery, fax or by mail, if no fax number is listed below. Additionally, electronic copies have been served by email upon those parties or counsel of record for whom the undersigned has email addresses.

Matthew W. Baab

STATE OFFICE OF ADMINISTRATIVE HEARINGS

WILLIAM P. CLEMENTS BUILDING
300 West Fifteenth Street
Austin, Texas 78701
Phone (512) 475-4993
Facsimile (512) 475-4994

SERVICE LIST

AGENCY: TEXAS COMMISSION ON ENVIRONMENTAL QUALITY (TCEQ)

STYLE/CASE: APPLICATION OF LAS BRISAS ENERGY CENTER, LLC FOR STATE AIR QUALITY PERMIT; NOS. 85013, HAP48, PAL41, AND PSD-TX-1138

SOAH DOCKET NUMBER: 582-09-2005

TCEQ DOCKET NUMBER: 2009-0033-AIR

STATE OFFICE OF ADMINISTRATIVE HEARINGS	CRAIG R. BENNETT TOMMY L. BROYLES ADMINISTRATIVE LAW JUDGES

PARTIES	REPRESENTATIVE/ADDRESS
TEXAS COMMISSION ON ENVIRONMENTAL QUALITY	ERIN SELVERA BEN RHEM TEXAS COMMISSION ON ENVIRONMENTAL QUALITY MC-175 P.O. BOX 13087 AUSTIN, TX 78711-3087 512/239-6033 (SELVERA) 512/239-6501 (RHEM) 512/239-0606 (FAX)
OFFICE OF PUBLIC INTEREST COUNSEL OF THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY	SCOTT A. HUMPHREY OFFICE OF THE PUBLIC INTEREST COUNSEL TEXAS COMMISSION ON ENVIRONMENTAL QUALITY P.O. BOX 13087, MC-103 AUSTIN, TX 78711-3087 512/239-6363 512/239-6377 (FAX)

LAS BRISAS ENERGY CENTER, LLC	JOHN RILEY CHRIS THIELE VINSON & ELKINS 2801 VIA FORTUNA, STE. 100 AUSTIN, TX 78746 512/542-8520 (RILEY) 512/542-8632 (THIELE) 512/236-3329 (FAX) 512/236-3283 (FAX)
SIERRA CLUB	ILAN LEVIN ENVIRONMENTAL INTEGRITY PROJECT 1303 SAN ANTONIO ST., STE. 200 AUSTIN, TX 78701 512/637-9477 512/584-8019 (FAX)
MEDICAL GROUPS	RICHARD LOWERRE LOWERRE, FREDERICK, PERALES, ALLMON & ROCKWELL 707 RIO GRANDE, SUITE 200 AUSTIN, TX 78701 512/469-6000 512/482-9346 (FAX)
TEXAS CLEAN AIR	TERRELL W. OXFORD SUSMAN GODFREY, LLP 901 MAIN, STE. 5100 DALLAS, TX 75202 214/754-1902 214/665-0847 (FAX)
LEAGUE OF UNITED LATIN AMERICAN CITIZENS (LULAC)	SUSIE LUNA-SALDANA, EDUCATION CHAIR LULAC, COUNCIL NO. 1 4710 HAKEL DR. CORPUS CHRISTI, TX 78415 361/779-0939 361/854-7453 (FAX)
CLEAN ECONOMY COALITION	GERALD SANSING, CHAIRPERSON CLEAN ECONOMY COALITION 5426 CHEVY CHASE DR. CORPUS CHRISTI, TX 78412 361/855-7051 361/854-5859 (FAX)
	PAT MORRIS Via email patrumo@juno.com

INDIVIDUAL PROTESTANTS	MANUEL CAVAZOS, III 4325 OCEAN DR. #7Y CORPUS CHRISTI, TX 78412 361/779-4266
ROGER LANDRESS	ROGER LANDRESS 242 MONTCIDER DR. CORPUS CHRISTI, TX 78412 361/993-3601 866/406-7550 (FAX)
COURTESY COPY	DENISE MALAN CORPUS CHRISTI CALLER TIMES P. O. BOX 9136 CORPUS CHRISTI, TX 78469 361/886-4334 361/886-3732 (FAX)

xc: Docket Clerk, State Office of Administrative Hearings
Docket Clerk, Office of the Chief Clerk, TCEQ, Fax No. (512) 239-3311